

9 On March 18, 2010 Defendant Mehrdad Hakimian (Hakimian)
10 was found guilty by a jury of conspiracy to commit wire fraud,
11 of wire fraud and of obstruction of justice. On April 9, 2010,
12 Hakimian filed a motion for a new trial. On June 4, 2010 this
13 Court held a hearing on the motions. Attorneys Stephen
14 Corrigan and Wade Rhyne appeared on behalf of the United States
15 and defendant was represented by Attorneys William Osterhoudt
16 and Frank Moore. Having reviewed the papers and having heard
17 oral argument on this matter, the Court finds the following.

18 A. Background

19 Defendant Hakimian was originally charged with
20 conspiracy to commit wire fraud; nine substantive counts of
21 wire fraud in violation of 18 USC § 1343; and two counts
22 alleging the harboring of specific illegal aliens in violation
23 of 18 USC § 1512(c).

On January 14, 2010, a Superseding Indictment was returned charging the defendant additionally with conspiracy to commit visa fraud and ten substantive counts of visa fraud in violation of 18 USC §§ 371, 1546(a). These charges alleged that defendant had signed H1B Visa applications for employees, which applications contained materially false information.

1 Additionally, the Superseding Indictment charged the defendant
2 with obstruction of justice pursuant to 18 USC § 1512(c)(1) in
3 connection with the removal of documents from the company
4 offices after execution of a search warrant in December 2006.

5 On February 5, 2010 the defendant pled guilty to all of
6 the visa fraud related counts in the Superseding Indictment
7 except Count 24, which count the government subsequently
8 dismissed. At that time Defendant also pled guilty to Counts
9 11 and 12 from the original Indictment, which had charged him
10 with harboring two illegal aliens. These guilty pleas were
11 placed under seal at the defendant's request.

12 A six week jury trial followed. At the end of the
13 trial, the jury found defendant guilty on all remaining counts.
14 Defendant has now filed a motion for a new trial, alleging that
15 the Court erred in several evidentiary rulings and in its jury
16 instructions.

17

18 B. Legal Standard

19 The Court is not required to order a new trial unless it
20 determines that the "interest of justice so requires." Fed. R.
21 Crim. P. 33(a). A motion for new trial should be granted "only
22 in an exceptional case in which the evidence weighs heavily
23 against the verdict." United States v. Merriweather, 777 F.2d
24 503, 507 (9th Cir 1985). See also United States v. Steel, 759
25 F.2d 706, 713 (9th Cir. 1985) (affirming district court's
26 denial of a new trial as a matter of "sound discretion" of the
27 district court).

28

1 C. Discussion2 1. Was Hakimian Unduly Prejudiced by the Admission of
3 Evidence Relating to Visa Fraud?

4 The superseding Indictment charged Hakimian with, among
5 other charges, two counts of harboring illegal aliens, one
6 count of conspiracy to commit visa fraud, and ten counts of
7 visa fraud. Prior to trial, Hakimian pleaded guilty to the
8 counts of visa fraud and to the counts of harboring illegal
9 aliens. Hakimian proceeded to trial only on the wire fraud
10 conspiracy, wire fraud, and obstruction of justice counts.

11 Defendant argues that at the February 12, 2010 pretrial
12 conference and during trial he objected to the government being
13 allowed to admit at trial information related to defendant's
14 fraudulent visa applications for his employees. During the
15 trial the government called as witnesses some of Hakimian's
16 current and former employees, including Bobby Guinto, Francis
17 Zamora, Antonette Morante, Joselito Lim, and Ida Manese. Some
18 of these witnesses testified that they over-billed insurance
19 companies at Hakimian's direction. During their testimony, the
20 government also introduced fraudulent H1-B visa petitions
21 sponsored and signed by Hakimian and established that Hakimian
22 had submitted these fraudulent visa petitions on behalf of the
23 testifying employee.

24 Defendant argues that the Court should not have
25 permitted this questioning as it was unfairly prejudicial to
26 the defendant; "it consumed court time and required him to
27 respond to numerous questions about it"; and "[i]t diverted the
28 jury's attention from the issues on trial. Defendant's Motion

1 at p.8. Defendant further argues that receipt of this evidence
2 was particularly prejudicial to him because he was precluded
3 from testifying that he had pled guilty to these charges.
4 Defendant argues that there was no justification for the
5 receipt of this evidence, which fundamentally violated the
6 defendant's due process right to a fair trial as well as Rule
7 404(a) of the Federal Rules of Evidence. See United States v.
8 Bradley, 5 F.3d 1317, 1320 (9th Cir. 1993). In his reply he
9 adds that as the fraudulent petitions were created by an entity
10 known as JobLink and were entered into before the visa fraud
11 happened, that they are not relevant.

12 The admission of this evidence is governed by Federal
13 Rule of Evidence 404(b). Rule 404(b) permits "other acts
14 evidence" when it "relevant to an issue other than the
15 defendant's criminal propensity." United States v. Chea, 231
16 F.3d 531, 534 (9th Cir. 2000) (quoting United States v.
17 Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982)). Evidence of
18 prior acts is admissible under Rule 404(b) if: (1) the evidence
19 tends to prove a material element of the offense charged; (2)
20 the prior act is not too remote in time; (3) the evidence is
21 sufficient to support a finding that the defendant committed
22 the other act; and (4) in cases where knowledge and intent are
23 at issue, the act is similar to the offense charged. United
24 States v. Ogles, 406 F.3d 586, 592 (9th Cir. 2005).

25 Defendant's argument focuses on the first prong, and
26 also on the issue of prejudice. Defendant concedes that
27 evidence that defendant harbored the illegal aliens would have
28 been relevant to the government's theory of the substantive

1 insurance fraud case, but that evidence that defendant
2 committed visa fraud on their behalf was not relevant.
3 According to defendant, the visa fraud is simply "other crimes
4 or wrongs" charged against him for which he is not on trial.

5 First, defendant acknowledges that the Court did sustain
6 many of defendant's objections during trial as to the testimony
7 on this issue and also that the Court limited the amount of
8 testimony admitted. The government asserts that the evidence
9 which was admitted was proper because it was "inextricably
10 intertwined" with the wire fraud conspiracy. Where evidence is
11 necessary to provide context for the charged crime it may be
12 exempt from Federal Rule of Evidence 404(b), and may be
13 admitted. United States v. Collins, 90 F.3d 1420, 1428 (9th
14 Cir. 1996). See also United States v. Hattabaugh, 295 Fed.
15 Appx. 249, 251 (9th Cir. 2008) (approving admission of prior
16 real estate fraud by the defendant to explain the defendant's
17 actions in a wire fraud scheme).

18 To be considered "inextricably intertwined", the
19 testimony must have "an important factual connection" with the
20 charged offense. United States v. DeGeorge, 380 F.3d 1203, 1220
21 (9th Cir. 2004). (prior losses have important factual
22 connection with charged offenses as they assist jury in
23 understanding scheme).

24 The government argues that the visa fraud evidence was
25 necessary to explain how Hakimian could rely on these foreign
26 workers to commit insurance fraud. The prosecution's theory was
27 that because Hakimian illegally sponsored these employees,
28 Hakimian had power over them to have them commit fraud on his

1 behalf.

2 Citing United States v. McKoy, 771 F.2d 1207, 1214 (9th
3 Cir. 1985), the government further argues that the visa fraud
4 evidence was admissible under Rule 404(b). Evidence of prior
5 bad acts which explain the nature of the relationship between
6 the defendant and a witness is independently admissible under
7 Rule 404(b). In McKoy, the defendant was charged with a
8 conspiracy to sell stolen goods. A government witness testified
9 that he arranged to buy the goods from the defendant and his
10 actions in the conspiracy were done at the instruction of the
11 defendant. The defendant denied any involvement with the
12 witness in the conspiracy. Id. at 1209. The government witness
13 testified that he had engaged in prior sales of stolen goods
14 from the defendant. Id. at 1213. The Ninth Circuit affirmed the
15 district court's admission of the "other acts" evidence,
16 holding that the witness's testimony explained the relationship
17 between the witness and defendant as a buyer and seller of
18 stolen goods, which explained to the jury the subsequent
19 actions of the witness in the conspiracy. Id. at 1214. The
20 prosecution argues that similar to McKoy, the visa fraud
21 testimony here gave the jury an explanation for the employee
22 witnesses' actions in the conspiracy.

23 Hakimian objects to this argument, asserting that the
24 evidence demonstrated that employees felt free to leave Glass
25 Masters when they wanted to and generally found employment, and
26 even new visa sponsors elsewhere. Since defendant intimated
27 that Bobby Guinto had acted on his own to enter the fraudulent
28 billings, the evidence of the visa application was relevant to

1 the issue of the relationship between Hakimian and Guinto. To
2 the extent that other employees who engaged in fraud
3 eventually left and found other sponsors, the government
4 counters that defendant's argument only goes to the weight of
5 the evidence, not its admissibility under Rule 404(b).

6 Defendant further argues that even if the evidence were
7 relevant and admissible, the Court should have precluded it as
8 unduly prejudicial under Federal Rule of Evidence 403. Federal
9 Rule of Evidence 403 excludes evidence if the probative value
10 is "substantially outweighed" by unfair prejudice. Fed. R.
11 Evid. 403. Rule 403 "is largely a matter of discretion with the
12 trial judge." United States v. Sangrey, 586 F.2d 1312, 1314
13 (9th Cir. 1978), as long as the court has engaged in a
14 balancing of the probative value versus the prejudice.

15 Given that defendant argued that the employees were
16 engaging in fraud on their own, the visa fraud evidence was
17 probative evidence of Hakimian's control over these employees
18 and his own involvement in the wire fraud conspiracy.
19 Moreover, the Court did take into consideration the potential
20 for prejudice to defendant of evidence which could portray him
21 as an employer who willfully flouts the law, however the Court
22 determined that the visa fraud evidence's probative value was
23 not substantially outweighed by unfair prejudice.

24 Hakimian contends finally that the prejudicial impact of
25 the visa fraud evidence was compounded by the Court's refusal
26 to inform the jury that Hakimian had entered pleas of guilty to
27 the charged visa fraud counts. Hakimian cites no legal support
28 for this assertion nor any part of the record to support that

1 he made a request during trial to have that evidence admitted.
2 Nor is there any way to know at this juncture whether the jury
3 would have looked favorably or negatively in this context on
4 the evidence of defendant's pleas of guilty.

5 The government argues that Court properly precluded
6 evidence of the Hakimian's pretrial pleas, and further claims
7 that any prejudice to defendant was offset by Hakimian's
8 testimony that he took full responsibility for his submission
9 of the false documents and his rationale for having engaged in
10 that behavior.

11 The Court finds that there was no reversible error on
12 the issue of admission of visa fraud evidence.

13

14 2. Did the Court Exclude Evidence of Repayment, and Was
15 That an Error?

16 Hakimian was first notified of over-billing allegations
17 when State Farm informed him of its investigation in 2005. By
18 February 2006, Hakimian had entered into a settlement of these
19 allegations with State Farm wherein he paid them \$1.2 million.
20 The government alleges that this settlement was made in
21 response to State Farm's threat that they would bring a civil
22 lawsuit against Hakimian.

23 In 2009, after criminal charges were filed against
24 Hakimian, he made additional payments to other insurance
25 companies. Hakimian alleges through counsel that he wanted to
26 make these repayments in 2007 after the filing of the criminal
27 complaint, but that he was counseled by his lawyers not to do
28 so.

1 Defendant contends that evidence of his repayments was
2 relevant to the issue of his intent and could have supported an
3 argument that these over-billings were inadvertent or made by
4 mistake and that the Court should have permitted such evidence.

5 First, as to defendant' payments to and settlement with
6 State Farm, defendant has cited to no attempt on his part to
7 admit the 2006 repayments, nor are there any citations to the
8 record to support the notion that the Court ruled to exclude
9 them.

10 As to the October 2009 repayments to various insurance
11 companies, these repayments, coming on the eve of trial, were
12 not relevant to Hakimian's intent at the time he was alleged to
13 have committed the fraud. Intent is "shown by examining the
14 scheme itself." United States v. Bohonous, 628 F.2d 1167, 1172
15 (9th Cir. 1980). Therefore this evidence was properly
16 excluded.

17 3. Emma DeGuzman

18 DeGuzman was originally a co-defendant in this matter.
19 Prior to the trial DeGuzman plead guilty to the alien harboring
20 and conspiracy to commit visa fraud charges and is now awaiting
21 sentencing on those counts. Defendant makes two arguments
22 relating to Emma DeGuzman. First, defendant argues that the
23 Court should have compelled the government to immunize DeGuzman
24 so that she would testify. Second defendant takes issue with
25 the Court's instruction to the jury that DeGuzman was
26 unavailable as a witness generally, arguing that the
27 instruction should have read that DeGuzman was unavailable only
28 to the defendant.

1 A. Immunity

2 Defendant alleges that DeGuzman was an active
3 participant in the events giving rise to the obstruction charge
4 in Count 13. Defendant subpoenaed DeGuzman with the idea that
5 she would give testimony exculpatory to him on the obstruction
6 charge. On advice of counsel DeGuzman represented that were she
7 called as a witness would claim her Fifth Amendment privilege.
8 Defendant then requested that the Court grant DeGuzman use
9 immunity pursuant to 18 USC § 6002, or compel the government to
10 do so. The Court reviewed the request but ultimately denied
11 it.

12 18 U.S.C. § 6002 empowers federal prosecutors to
13 immunize testifying witnesses, but it does not mandate them to
14 do so. The government must exercise its power to immunize
15 consistent with the Fifth and Sixth Amendments. However, in
16 order to compel the government to immunize a witness, the
17 defendant must show that the witness's testimony is relevant
18 and that (1) the prosecution intentionally caused the defense
19 witness to invoke the Fifth Amendment right against
20 self-incrimination with the purpose of distorting the
21 fact-finding process; or (2) the government granted immunity to
22 a government witness, but denied immunity to a defense witness
23 whose testimony would have directly contradicted that of the
24 government witness, with the effect of so distorting the
25 fact-finding process that the defendant was denied a
26 fundamentally fair trial. United States v. Straub, 538 F.3d
27 1147, 1162 (9th Cir. 2009).

28 Hakimian proffered that DeGuzman would testify that

1 "before the boxes were moved from the office, she determined
2 which of the boxes situated in the upstairs loft should be sent
3 to storage, and which should be thrown away due to their age
4 due and the lack of any further need for them." (Def.'s Mot.
5 for New Trial 15.) In order for the Court to compel immunity
6 for a witness, that witness' testimony must "directly
7 contradict" a government witness. Id.

8 In Straub, the Court found that the government's refusal
9 to immunize the sole defense witness who was the only witness
10 who could undermine the prosecution's key witness was
11 fundamentally unfair, especially when the government immunized
12 all but one of its witnesses. Straub, 538 F.3d at 1164. Under
13 Straub, for the Court to force the government to grant a
14 witness immunity, it is not sufficient for defendant to show
15 that the witness's testimony would support defendant's version
16 of the facts. The Fifth Amendment "does not create a general
17 right for a defendant to demand use immunity for a
18 co-defendant...." The requirement to order use immunity applies
19 only in "exceptional cases" where the defendant's right to a
20 fair trial would otherwise be violated. Id. at 1166.

21 Defendant has not identified which government witness'
22 testimony DeGuzman would contradict. The immunized testimony
23 received in the trial was from Linda Macom, Antoinette Morante,
24 and Nanette Guinto. These witnesses' testimony all went to the
25 insurance fraud counts, not to the obstruction of justice
26 count. Since no immunized government witness testified
27 concerning who selected boxes of documents at the corporate
28 office to be destroyed or relocated, Hakimian's argument fails.

1 Defendant argues that the government's reading of Straub is too
2 narrow, but the Court finds that Straub sets out certain
3 proscriptions which must be met here and which have not been.

4 While Hakimian argues that the effect of denying
5 DeGuzman immunity distorted the fact-finding process, that is
6 only one prong of the necessary showing. As discussed above,
7 Hakimian must first show that DeGuzman would directly
8 contradict a government witness, which he has not done. While
9 Hakimian argues for the Court to adopt a more expansive reading
10 of Straub expanding the requirement of immunity beyond
11 instances where there is a direct contradiction, Straub
12 counsels prudence. The Court mindful of the separation of
13 powers issues inherent in invading the province of the
14 prosecution, sees no reason to act beyond the limits enunciated
15 in Straub.

16 Nor has Hakimian met the other possible showing under
17 Straub, that the prosecution intentionally caused the defense
18 witness to invoke the Fifth Amendment right against
19 self-incrimination with the purpose of distorting the
20 fact-finding process. Hakimian alleges that prosecutors
21 admonished DeGuzman's attorney that DeGuzman should not testify
22 in support of Hakimian, or "it would go badly for DeGuzman at
23 sentencing." (Def.'s Mot. For New Trial 16.)

24 As support for its premise that this alleged statement
25 required a grant of immunity, Hakimian relies on People v.
26 Treadway, 182 Cal.App. 4th 562, 564 (2010). In Treadway, a
27 prosecutor prevented the witness from testifying by
28 conditioning a plea agreement on the witness's promise to not

1 testify. The court held that by blocking the defendant from a
2 witness, the government violated the defendant's right to
3 compel witnesses. Id. at 567. Such is not the situation here.
4 The Court finds no evidence in the record or in its observation
5 that the prosecution took any steps to "intimidate or harasses
6 the witness to discourage the witness from testifying, for
7 example, by threatening the witness with prosecution for
8 perjury or other offenses." Williams v. Woodford, 384 F.3d 567,
9 601-602 (9th Cir. 2004).

10 B. Jury Instruction on Availability

11 Hakimian finally argues that because the government
12 alone had the power to compel DeGuzman's testimony through a
13 grant of immunity, the jury should have been instructed that
14 she was unavailable only to the defense, as opposed to the
15 instruction given by the Court, that she was unavailable
16 generally.

17 Defendant requested that the Court instruct the jury
18 that "Emma DeGuzman is unavailable to the defense as a witness.
19 You should draw no adverse inference against the defendant
20 based on Emma DeGuzman's failure to testify." The defense
21 requested, in the alternative that the Court instruct the jury
22 that "DeGuzman was unavailable to either side." The Court
23 agreed to give a neutral instruction that DeGuzman was
24 unavailable and that the jury should not draw an adverse
25 inference against either party from DeGuzman's unavailability.

26 Defendant argues that the instruction was misleading in
27 that it implied that DeGuzman "was equally unavailable to the
28 defense and the government" when the government had the ability

1 to make DeGuzman available by the "simple expedient" of
2 offering her use immunity. As discussed above, the government
3 was not legally obligated to offer DeGuzman immunity. Thus the
4 government's rationale for not doing so is irrelevant to the
5 question of unavailability.

6 The fact remains that DeGuzman, through her own decision
7 to invoke the Fifth amendment, has made herself unavailable as
8 a witness. A witness who invokes the right against
9 self-incrimination is equally unavailable to both parties, and
10 a missing person instruction is unwarranted. United States v.
11 Fermin, 2000 WL 203794 at *1 (9th Cir. 2000); United States v.
12 Brutzman, 731 F.2d 1449, 1453-4 (9th Cir. 1985), overruled on
13 other grounds by United States v. Charmley, 764 F.2d 675, 677
14 n. 1 (9th Cir. 1985). Hakimian has offered no legal authority
15 to the contrary, and the Court is aware of no case law which
16 would find the instruction granted to be improper.

17 C. Instruction on Obstruction

18 As to the obstruction count, The Court instructed the
19 jury that:

20 To convict Hakimian of obstruction of justice, the
21 government must prove that: (1) Hakimian corruptly
22 altered, destroyed, or concealed records,
23 documents, or other objects, or attempted to do
24 so; (2) the records, documents or other objects
25 were related to an official proceeding, which, in
26 this case, was a law enforcement investigation
carried out by a Federal agency; and (3) Hakimian
believed the records, documents or other objects
would be related to a law enforcement
investigation and intended to impair the integrity
or the availability of the documents or objects
for use in the investigation.

27 The Court defined "corruptly" as acting "with the
28

1 purpose of wrongfully impeding the due administration of
2 justice." The Court also instructed the jury that "the
3 government is not required to prove that the defendant knew
4 that his acts or omissions were in violation of an applicable
5 federal statute." (Docket No. 86, Final Jury Instruction, at
6 pp. 17-18.) Defendant argues in his motion that the second
7 clause of the instruction was inconsistent with the first, and
8 thus the instruction was in error.

9 The Court was not required to instruct the jury that
10 defendant knew his acts or omissions were in violation of the
11 specific statute, 18 U.S.C. § 1512(c)(1). Again, defendant has
12 cited no authority requiring an instruction that defendant must
13 know of the existence of § 1512(c)(1) and have the intent to
14 violate that particular statute.

15 The Court's instruction was in accord with Ninth Circuit
16 law. The Ninth Circuit, in interpreting the phrase "corruptly
17 persuade" in 18 U.S.C. § 1512(b), defined "corruptly" as
18 conduct motivated by an inappropriate or improper purpose.
19 United States v. Khatami, 280 F.3d 907, 911 (9th Cir. 2002).
20 See also Arthur Andersen LLP v. United States, 544 U.S. 696,
21 706 (2005)(term "corruptly" associated with wrongful, immoral,
22 depraved, or evil conduct).

23 The Court's instruction, therefore was sufficient to
24 have the jury understand the culpable state of mind of
25 defendant as the jury was not required to find that defendant
26 knew the exact parameters of the statute he would later be
27 convicted of violating.

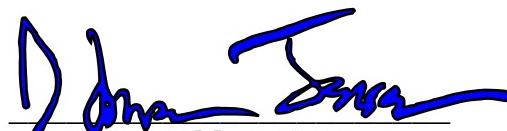
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1 III. Conclusion
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3 Accordingly the Motion for a New Trial is DENIED.
4

5 IT IS SO ORDERED.
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7 Dated: July 1, 2010
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D. Lowell Jensen
United States District Judge